

## Family Law Information Centre Court Procedure Booklet #1

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# Information for Unrepresented Parties about Child Support Matters

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The Family Law Information Centre and Queen's Bench Chambers Office cannot give you legal advice or financial guidance, and cannot predict the outcome of court decisions.

This booklet provides general information only. You should speak to a lawyer for legal advice about your own situation.

The Court Procedure Booklets listed on the inside cover of this booklet are available electronically at **[www.albertacourts.ab.ca](http://www.albertacourts.ab.ca)**.

The Court Procedure Booklets are available for sale from Queen's Printer Bookstore by phoning (780) 427-4952 in Edmonton, or (403) 297-6251 in Calgary, or by phoning 310-0000 toll-free from anywhere in Alberta and asking for either of these phone numbers, or by accessing the Queen's Printer website at **[www.gov.ab.ca/qp](http://www.gov.ab.ca/qp)**.



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## **Family Law Information Centres**

The Family Law Information Centres can provide information about:

- the Federal Child Support Guidelines,
- how to calculate child support,
- how to apply for or change a Child Support Order,
- how to oppose an application that involves child support, and
- the procedures that must be followed in other family law matters, such as spousal support and child custody.

Family Law Information Centres can be found at the following locations:

### **Family Law Information Centre, Edmonton**

Law Courts Building  
1A Sir Winston Churchill Square  
Edmonton, Alberta, T5J 0R2  
Tel: 780-415-0404  
Fax: 780-415-0403

### **Family Law Information Centre, Calgary**

Court House Annex  
603 - 6th Avenue SW  
Calgary, Alberta, T2P 0T3  
Tel: 403-297-6600  
Fax: 403-297-6605

## **Family Law Information Centre Court Procedure Booklets**

### **Applications Dealing With Child Support Or Arrears**

If your application deals with child support or arrears, you should read the booklet "Information for Unrepresented Parties about Child Support Matters" before reading the appropriate procedure booklets below.

#### **Child Support — when both parties live in Alberta**

Obtaining Income Information from the Other Party for Child Support Applications

Applying for an Order for Child Support

Changing an Existing Order for Child Support

Decreasing Child Support, Reducing or Cancelling Arrears, and Stay of Enforcement

Reducing or Cancelling Arrears and Stay of Enforcement (where there is no change to ongoing support)

Applying for an Order for Child Support Under the Parentage and Maintenance Act

Applying for a Consent Order that Includes Child Support

Opposing an Application that Involves Child Support

#### **Child Support — when the respondent lives outside Alberta**

Provisional Application to Change an Order for Child Support - Divorce Act

### **Spousal Support**

Applying for an Order for Spousal Support

Changing an Existing Order for Spousal Support

### **Custody and Access**

Applying for an Order for Custody and/or Access

Changing an Existing Order for Custody and/or Access

### **Combination Applications**

Applying for an Order for Child Support and Custody and/or Access

Changing an Existing Order for Child Support and Custody and/or Access

Applying for an Order for Child Support and Spousal Support

Changing an Existing Order for Child Support and Spousal Support

Applying for an Order for Child Support, Spousal Support and Custody and/or Access

Changing an Existing Order for Child Support, Spousal Support and Custody and/or Access

### **Restraining or Protection Orders**

Applying for a Restraining Order Without Notice

Applying for a Protection Order on Notice

Review of an Emergency Protection Order

### **General**

Opposing an Application that Does Not Involve Child Support

Applying for a Consent Order that Does Not Include Child Support

Transferring Your Court File

General Family Law Application



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## Information for Unrepresented Parties about Child Support Matters

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## About the Court Procedure Booklets Series

## About this Booklet

The Family Law Information Centre has created a series of booklets to provide information on Alberta court procedures related to family law matters. This series is meant primarily as a resource for persons representing themselves.

If you decide to make an application to the court, you should refer to one of the court procedure booklets in this series. The booklets are listed on the inside front cover.

The Family Law Information Centre and Queen's Bench Chambers or Clerk's Office cannot give you legal advice or financial guidance, and cannot predict the outcome of court decisions. We recommend that you speak to a lawyer for legal advice about your own situation.

If your application deals with child support or arrears, you should read this booklet before reading any other court procedure booklets in the series.

This booklet is meant to provide general information about the law relating to child support, and the principles applied by the court when deciding child support matters.

This information is general in nature, and is not intended to be an in-depth discussion of all legal issues relating to child support. We recommend that you speak to a lawyer to find out how the law would be applied to your situation.

If you need further information, please contact the Family Law Information Centre. They can answer questions you have about:

- the *Federal Child Support Guidelines* (or "Guidelines") and how to calculate child support,
- steps for getting or changing a Child Support Order or opposing these applications, and
- court procedures for other family law matters.

The addresses for the Family Law Information Centres in Edmonton and Calgary are on the inside front cover.

The inside back cover features a list of Internet addresses where you can obtain further information.

## **Principles Applied to All Applications\***

There are three basic principles that apply to all child support applications. These principles apply whether the amount of child support is being set for the first time or whether an application is being made to change that amount or to cancel or reduce arrears.

### **Joint legal obligation**

Both parents have a legal obligation to support their children. This is such an important obligation that a divorce cannot be granted until parents make satisfactory arrangements for the care of their children.

The person paying the support has no right to control how those funds are spent. The court will assume that the parent with custody has the best interests of the children in mind when making budgeting decisions. Because the standard of living of both the child and the parent the child lives with will affect the child's welfare, the parent with custody may receive some benefit from child support payments. This is especially true when the parent paying support has a high income.

### **A child has a right to support**

Even though child support is generally paid to the parent, it is the child that has the right to child support. This right has been confirmed by the *Guidelines*.

This means that a parent with custody cannot bargain away child support, or accept an amount which is unreasonably low, given the paying parent's circumstances.

### **The ability to pay**

The amount of child support is based on ability to pay. That means that it is based not only on what the parent does earn, but also what the parent can earn. Parents have a legal obligation to earn as much as they are capable of earning to meet their obligation to support their children.

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\* The Information in pages 2 - 4 and 19 - 24 of this booklet is adapted from the case Earle v. Earle [1999] BCJ No. 383, Martinson J.



## **Principles Applied to Changes in Child Support**

There are two basic principles that apply to applications to change existing Child Support Orders.

### **Change in financial circumstances**

Before a judge can change the amount of an existing child support payment, there must be a significant and long-lasting change in the financial situation of one or both parents, or a change in the amounts paid for the children's special expenses. This must be a change that has occurred after the original Child Support Order was made.

### **Changes introduced by the *Federal Child Support Guidelines***

The *Guidelines* may affect the amount of child support payments. The fact that the Child Support Order was made before the *Guidelines* came into force may give you the right to have your support amount reviewed by a judge.

However, the judge does not have to change an Order to conform with the *Guidelines* just because a parent asks. The Order may not be changed if the amount of child support that would be payable under the *Guidelines* would be unreasonable when compared with the arrangements that were made in the previous Court Order.

## **Effect of the Federal Child Support Guidelines**

Under the Divorce Act the federal government has provided a new method of calculating child support: *The Federal Child Support Guidelines*. One of the reasons for this change was to make sure that child support awards are fair and consistent throughout the country. The *Guidelines* contain the basic principles discussed earlier in this booklet. They also provide a formula for determining the amount of child support to be paid.

The objectives of the *Guidelines* are:

- to establish a fair standard of support for children that makes sure they continue to benefit from the financial means of both spouses after separation,
- to reduce conflict and tension between spouses by making the calculation of Child Support Orders more objective,
- to improve the efficiency of the legal process by giving courts and spouses guidance in determining the amount of child support and encouraging settlement, and
- to make sure that spouses and children are treated consistently in similar circumstances.

When considering an application to reduce or cancel arrears, the court can consider the amount that would have been payable under the *Guidelines* from May 1, 1997 onward. However, the court will not consider the *Guideline* amounts before that, because they became law on that date.

The *Federal Child Support Guidelines* are made up of rules and tables for calculating the amount of child support that should be paid based on guideline income, the number of children, and the province or territory of residence of the paying parent.



## What Financial Information Do You Have to Give to Your Ex-spouse?

One of the changes that came about with the introduction of the *Guidelines* relates to the exchanging of financial information between parents when that information is necessary to determine the amount of child support. For the specific *Guidelines* text, please see sections 21 to 25 in Appendix 1.

Under the *Guidelines*, income information is necessary in three instances:

- When a parent is paying child support, that parent's income must be provided. In a split or shared custody arrangement, the income of both parents must be provided. (See page 14 for information on split and shared custody.)
- The income of both parents must be provided where special expenses or "add-ons" are being claimed. (See page 12 for more information on special expenses.)
- The income of both parents must be provided if either is claiming undue hardship. (See page 17 for more information on undue hardship.)

Note: Even if the *Guidelines* do not require the income information of the parent who will be receiving child support, the court may still require it.

The *Guidelines* outline exactly what information a person must provide to the court and to the other parent when applying for, or responding to, a child support application. The *Guidelines* also outline what action a person can take if an individual fails to disclose necessary income information. Parents have a continuing obligation to provide each other with financial information on a yearly basis if the request is made in writing. Once a request is made, the parent living in Canada has 30 days to provide the information requested.

Note: It is not unusual for the court to impute income to a parent, or to award costs against a parent, who has not provided income information.

You can ask the other parent for income information by filing and serving a Notice to Disclose. You should ask your lawyer about how to get the other parent's financial information. If you are representing yourself, see the Court Procedure Booklet *Obtaining Income Information from the Other Party for Child Support Applications*.

In order for the court to determine the standards of living of both households in an undue hardship application, the court will need to know how many people are living in each household and the total household income. If there are new spouses or other adults living in one household, the court will want to know how much these people earn as well. The incomes of other persons in the household are not used to determine what the “table” amount of child support is but only to determine if this is the appropriate case to either “cut a break” on the amount of child support or to “top up” the amount of child support that would otherwise be awarded. For more information on undue hardship please see page 16.

What if you need the information of a member of the other household and that information is not provided? As that person is not a “party to the action,” they would not be obligated under the *Guidelines* to disclose this information. In this case, you may wish to ask the court to impute (set or assign) income to that person. This will give you the necessary figures to complete a standards of living calculation.



## The Basic Child Support Calculation

The payor is the parent who is required to pay child support for the children in the other parent's custody or care. The recipient is the parent who receives child support. Under the *Guidelines* there are "tables" for each province and territory that are used to calculate the base or "table" amount of child support that the payor is required to pay, based on the following:

- the province or territory where the payor resides (or, if the payor resides outside of Canada, the province or territory where the recipient resides)
- the number of children in the other parent's custody or care that the payor is obligated to support, and
- the guideline income of the payor.

The basic amounts of support in the *Guideline* tables are based on the parent's gross annual income. The table amounts already take into account the usual deductions from income, such as taxes, and the usual costs of access to the children. These table amounts have been determined after looking at what parents in different income brackets generally spend on their children. The support amounts are intended to cover not only the direct costs for the children, but also the indirect costs, such as housing and transportation. Paying child support takes priority over paying any other expenses.

There may be special or add-on expenses that are shared between the parents and added to the table amount of support. See page 12 for more information.

The table amount plus the payor's share of any special or add-on expenses is the basic method for calculating child support. This basic method would be used for a sole custody situation and is to be used unless the *Guidelines* allow a different method.

## Guideline income

### What is your Guideline Income?

The payor's guideline income must be calculated in order to use the tables. The recipient's guideline income must also be calculated if there are special expenses or "add-ons" being claimed (see page 12), if the parents have a split custody or shared custody arrangement (see page 14), or if one of the parents is claiming undue hardship (see page 17).

There are several methods the court can use to calculate guideline income - keeping in mind that the court is always trying to use the most current information. The court wants to determine how much money is really available for support. For the specific *Guidelines* text dealing with calculating income, please see sections 15 to 20 in Appendix 1.

As a starting point, guideline income might be calculated using the sources of income that make up the total income on the last filed Income Tax Return.

For a simple employment situation, the starting point would be line 101 of the Income Tax Return. This is the gross income a person has earned from employment before taxes and deductions. When calculating guideline income, the only usual deductions from this gross income are union or professional dues from line 212 of the Income Tax Return.

In other income situations, the starting point would be the sources of income from lines 101 through to 147 of the Income Tax Return.

Sometimes using what a person made in the previous year is not a good way of determining what income to use to calculate child support. That person could have changed jobs, lost a job, or know that they will not be earning the same amount as reported on their last Income Tax Return. Here it might be better to estimate what the person will be earning in the current year based on letters of employment or actual pay stubs, for example.

In some cases, the court may wish to take an average of the person's income over the last three years, or an average of one of the sources of the person's income over the past three years, when calculating guideline income.

The court can also impute (set or assign) income to a person. For example, the court might impute income if a



person is unemployed or is underemployed and the court feels that person has the ability to earn more income. Based on the evidence given to the court about the ability of a person to earn income, the court can assign a guideline income and the person must pay support according to this assigned income. For the specific *Guidelines* text dealing with imputing income, please see section 19 in Appendix 1.

The table amounts are based on taxable income. If the person is not paying taxes, the court might impute some income or "gross up" the income so it is comparable to a person's income who does pay taxes. This could be the case for a person receiving payments from the Workers' Compensation Board, some disability pensions or because the person has special tax status as a Native Canadian.

If a parent receives social assistance, the guideline income is just the amount that is paid for that person, and not the amount of assistance that may be paid for children or other people in the household.

There may be cases where a person has income or resources that are not reportable on a tax return but that could still be considered to be part of guideline income, such as student grants. However, Child Tax Benefit, and GST refunds are not considered part of guideline income. Also, child or spousal support payments are not considered part of guideline income.

### **Self-employment income**

If a person is receiving money from sources other than employment income, determining how much money is available for child support can be complicated. This is the case with many self-employment, farming and corporate income situations. In these situations, you should get a legal opinion and/or an accountant's opinion. The Family Law Information Centre will not be able to help you go through financial statements in order to determine what the person's guideline income might be. For the specific *Guidelines* text dealing with calculating income when self-employed, please see sections 15 to 20 in Appendix 1 and Schedule III of the *Federal Child Support Guidelines*.

To determine income when a person is self-employed, the court starts by looking at taxable income, which is gross

business income less allowable business deductions. While the deductions may be reasonable for tax purposes, they may not be reasonable for determining child support payments. It may be necessary to question each of the deductions.

The court will want to know if these expenses were necessary to earn business income. Certainly materials needed to operate the business are legitimate deductions. For example, if your company is in the business of selling apples, the cost of purchasing the apples would be reasonable. On the other hand, the court may want to know whether personal expenses are being written off, if transportation and meal allowances are reasonable or if travel is necessary. If the person is paying a salary or wage to a new spouse or relative, the court will want to know if the amount paid is reasonable in relation to the duties that spouse or relative performs for the business.

If the person is a shareholder, director, or officer in a corporation, the court will want to see evidence of their personal income tax returns as well as the corporate income tax returns and financial statements. The court may want to know if there are other shareholders, how much all the shareholders are paid each year and what the retained earnings are in the company. As with self-employed income, the court may question the reasonableness of the expenses claimed by the corporation.

In both self-employed and corporate income situations, the court can look beyond the personal income tax return to determine how much money is actually available to support the children.

If you are asking the Family Law Information Centre to calculate child support, you will need to provide proof of what both the payor and the recipient earn. This financial information should at least include: copies of the Income Tax T1 General forms and notices of assessment and reassessment for each of the three most recent taxation years from Canada Customs and Revenue Agency, copies of the three most recent pay stubs showing gross pay for the year to date, or other proof of current income, and any other information you have to support the calculation of the guideline income of both yourself and the other parent.



If both the payor and the recipient provide each other with financial disclosure, they may be able to agree on what their guideline income is. If the other parent will not provide the necessary income information or if parents cannot agree on what method to use to calculate guideline income, you may ask the court to decide for you.

## What is an “Add-on” Expense?

As discussed previously in this booklet, there are tables which will tell you the starting point for child support based on the payor's income, the number of children that he or she is obligated to support, and the province or territory where the payor lives.

There are some expenses, commonly referred to as “special” or “add-on” expenses, which are not included in the table amount and which may be paid in addition to the table amount. Either parent may have special expenses. The amount of child support to be paid is the table amount plus a portion of the special expenses. For the specific *Guidelines* text on add-on expenses, please see section 7 in Appendix 1.

These expenses are generally shared between the parents proportionately to their income. For instance, if both parents make the same amount of money, the cost of the add-on is split evenly between the parents. Your lawyer or the Family Law Information Centre can help you calculate what share each parent will have to pay. It is possible for the parties to agree or the court to order that the add-on expenses be shared between the parties in a way that is not proportionate to income.

If you and the other parent cannot agree on what should be included as an add-on expense and/or how those expenses should be shared between you, you can ask the court to decide. If you are asking the court to determine what the add-ons are in your case, the court will look at several factors, including:

- Is the expense necessary and in the child's best interest?
- Is the expense reasonable?
- Can the parents afford this expense?
- Did the family have these types of expenses before they separated?

The wording of section 7 is open to interpretation and the courts have a fair amount of discretion as to whether or not to add on an expense. Some expenses, such as day care or before and after school care, medical and dental premiums or health related expenses are pretty straight forward. However, expenses either for primary or secondary school and for extracurricular activities must be “extraordinary” before they will be considered add-ons. Because the word extraordinary is

not defined, the judge will have to decide whether or not any expenses in these categories are extraordinary.

Some expenses, such as daycare, medical expenses and post-secondary tuition expenses are tax deductible to the parent with custody. That parent may also be eligible for subsidies, and medical or dental expenses may be partially covered by an insurance plan. In these cases, it is the net cost of the expense, after tax deductions and subsidies, that is considered the add-on expense.



## **Split and/or Shared Custody**

Your type of custody arrangement may affect how child support is calculated under the *Guidelines*.

### **Sole Custody**

Sole custody is when the child resides with one parent for most of the time. You may have a court order or agreement that grants joint custody. However, unless the paying parent has the child for more than 40% of the time, over the course of the year, the custody arrangement is considered to be sole custody for the purpose of calculating child support.

If you have a sole custody arrangement, the amount of support is determined by the basic child support calculation - see page 7.

### **Split Custody**

Split custody is where one or more children live with each parent. An example of split custody would be if there are two children and one child lives with the mother and the other child lives with the father. For the specific *Guidelines* text on calculating child support income in split custody arrangements, please see section 8 in Appendix 1.

In split custody, you must first determine what each parent would pay the other parent for the number of children in the other's care using the basic method described on page 7. The difference between these amounts, or the "set-off" amount, is what the parent who is required to pay the higher amount would have to pay the other parent.

### **Shared Custody**

Shared custody is where the paying parent has care of the child for at least 40% of the time over the course of the year. For the specific *Guidelines* text on calculating child support in shared custody arrangements, please see section 9 in Appendix 1.

"Shared custody" should not be confused with the terms "joint custody" or "joint parenting," which may refer to different custody arrangements. You should speak to a lawyer to determine what type of arrangement you have.

When calculating the child support when there is shared custody, each shared child is counted as a child in each parent's household. You would first determine what each parent would pay the other parent for the number of children in the other's care, including the shared children. The difference between these amounts, or the set-off amount, is the starting point for child support. The parent who is required to pay the higher amount would pay the other parent the set-off amount.

You and the other parent may agree on the set-off amount, or on another amount that you feel is appropriate in your circumstances. If you cannot agree on whether you have shared custody and/or the amount of child support, you can ask the court to make the decision. If the court decides there is shared custody, the court can either award the set-off amount, or some other amount, while considering these factors:

- the amounts set out in the applicable tables for each of the parents;
- any increased costs of the shared custody arrangements; and
- the conditions, means, needs and other circumstances of each parent and any of the children for whom support is sought.

You may have a situation where you have both split and shared custody. Again, the starting point would be to calculate the set-off amount, counting the shared children as children in each household. You and the other parent may agree on the amount to be paid for child support. If you do not agree, you may ask the court to decide. The court could decide to award this set-off amount or some other amount.

## Support for Children At or Over Age 18

The *Guidelines* apply to children as defined by the *Divorce Act*. The *Divorce Act* defines a “child of the marriage” as a child of the parents who is:

- under the age of majority and who has not withdrawn from their charge, or
- a person at or over the age of majority and under their charge, but unable, by reason of illness, disability, or other cause to withdraw from their charge or to obtain the necessities of life.

The age of majority in Alberta is 18. If the child lives outside Alberta, you must use the age of majority for the province where the child is living.

Depending on the circumstances, a child at or over age 18 may or may not be eligible for child support. You should speak to a lawyer if you are uncertain. If you and the other parent cannot agree, you can ask the court to decide.

The child support for that child may be calculated by applying the *Guidelines* as if the child were under the age of 18; that is, by performing the basic calculation, table amount plus any special expenses, for the total number of children, including the child at or over age 18. You and the other parent may agree to set child support at this amount under the *Guidelines*. Or, you may agree to use the basic calculation for the children under 18, but a different amount for the child over 18 to reflect their circumstances. For the specific *Guidelines* text on calculating child support for a child at or over age 18, please see section 3(2) in Appendix 1.

If you and the other parent cannot agree on how to calculate child support, you can ask the court to decide. The court may either award the amount under the *Guidelines*, or if the court decides that approach is inappropriate, the court may set a different amount based on the following:

- the condition, income, needs and other circumstances of the child; and
- the financial ability of each parent to contribute to the support of the child.



## Undue Hardship

There are times when either the payor or the recipient can ask the court to adjust the amount of child support. The payor may say to the court: "I agree that this is the amount that I am required to pay under the *Guidelines*, but I can't pay this amount because my financial circumstances have caused me undue hardship." Or the recipient may say to the court: "I agree that this is the amount that the *Guidelines* provide for the support of my children, but this is not enough and I need more than this to support my children because I am suffering an undue hardship."

One of the objectives of the *Guidelines* is to make sure that child support awards are consistent throughout the country. However, the federal government recognized that there may be cases where the *Guidelines* do not provide the fairest way of calculating child support. The undue hardship section of the *Guidelines* allows the court to award an amount either above or below the usual *Guideline* amount. For the specific *Guidelines* text on undue hardship, please see section 10 in Appendix 1.

The recipient or the payor must first prove to the court that they or their children are suffering an undue hardship. The *Guidelines* set out five defined areas which may be considered to be undue hardship:

- (a) the person has an unusually high level of debt which came about because they were supporting their spouse and children before the time they were separated or which was necessary for them to earn a living;
- (b) the person has unusually high transportation or travel expenses related to visiting or transporting their children for access visits;
- (c) the person has a legal duty under a judgment, order or written separation agreement to support any person;
- (d) the person has a legal duty to support another child or children (from another relationship) who is under the age of majority or unable to support themselves because of illness, disability or other cause; or
- (e) the person has a legal duty to support any person who is unable to support themselves due to illness or disability.

The court is not limited to using just these five areas as examples of undue hardship. The five examples set out in the *Guidelines* all seem to have a common thread however - that because of some special circumstance, there isn't enough money, either in the payor's household or the recipient's household, to meet the needs of their children.

Some cases where the court might find undue hardship are:

- A person has children in several households that they are required to support. If the person paid the full *Guideline* amount for all of the children, they would not have enough money left over to live on.
- One parent took on the responsibility of a debt incurred while they were together, which is creating a burden on their ability to pay child support.
- A parent lives a long way away from the children and must, in addition to the usual access costs, pay the cost of transporting the children to and from access visits. If the parent pays the full guideline amount, that parent would not be able to afford to pay the travel costs for the access visits.

In simple terms the person is asking the court to be "cut a break" on the *Guideline* amount of support or to "top up" the *Guideline* amount of support because they are suffering an undue hardship.

The first step to having the court adjust the *Guideline* amount is to prove that because of some special circumstance, you or your children would be suffering an undue hardship if you were forced to pay the full guideline amount, or if you were to receive only the guideline amount.

While the court may agree that there are special circumstances that have caused undue hardship, the amount of the child support will not be adjusted unless you can also prove that the standard of living in your household is lower than the standard of living in the other household. This is the second step: a comparison of the standards of living in each household.

The *Guidelines* provide a complicated mathematical formula for determining and comparing household standards of

living. In very simple terms, the test will look at all the income available in your household and the number of people living off that income as compared to a similar family existing at the poverty line, called a low income measures amount. This mathematical comparison will result in a number, usually between 1 and 2. The same test is then applied to the other household, and the result will again be a number. The numbers themselves have no special meaning, however, the household with the lower number has the lower standard of living.

The test takes into account the special circumstances that have caused the hardship, and the cost of those special circumstances. For example, if you are claiming undue hardship because you are paying support for another child, the amount of that support is subtracted from your income.

Your lawyer, or the Family Law Information Centre, can help you with the standards of living test.

The court does not have to use the standards of living test that is set out in the *Guidelines*. Since that test looks only at income, it may not be the best measure of standards of living in all cases. However, even if you want the court to compare standards of living another way, you must still provide the court with the Standards of Living calculation.

If the court accepts that you are suffering from undue hardship, and that you have the lower household standard of living, then the door is open for the court to consider either “cutting a break” on the child support or “topping up” the child support. In either case the court will set the support amount at what it decides is appropriate in the circumstances.



## **Principles Applied to Cancelling or Reducing Arrears**

There are two basic principles that apply to cancelling or reducing child support arrears.

### **Change in financial circumstances**

Before a judge can cancel or reduce the amount of arrears owed by the paying parent, there must be a significant and long lasting change in the parent's financial situation.

The courts are generally reluctant to reduce or to cancel arrears. Arrears will not be reduced or cancelled unless significant unfairness would result.

### **Postponing payment or paying over time**

Just because the arrears are not cancelled does not mean that they have to be paid right away. The court has the right to postpone payment for a reasonable period of time or make reasonable terms for payment, if it seems appropriate. The court will consider all the circumstances of a case, including the present financial circumstances of the person paying child support. This would only be done when there has been a complete disclosure of the financial situation of the person asking to postpone payment or to pay over time.

## **Common Arguments For Cancelling or Reducing Arrears**

There are often specific arguments that are made to the courts when a parent applies to cancel or reduce arrears. Here are the legal rules that apply to those arguments:

### **"I cannot afford to pay now."**

Not being able to pay now is not a legal reason to cancel or reduce arrears. Arrears will only be cancelled if you are unable to pay now and will be unable to pay in the future. However, the court may consider a new repayment plan.

### **"I could not pay when I was supposed to because my financial circumstances changed."**

It is sometimes possible to have arrears reduced for this reason. However, it is not good enough just to say that you could not pay because you earned less than at the time the support amount was ordered. Arrears will only be cancelled or reduced if you give the court detailed and full financial disclosure that proves that:

- there has been a significant and long lasting change in income,
- the change was not made by choice,
- every effort was made to earn money (or more money) during the time in question, and those efforts were not successful,
- having to pay those arrears will pose a hardship, and
- there is a good reason why you did not apply to the court to reduce the support at that time.

### **"I could not pay when I was supposed to because I had new obligations."**

This raises questions of priority. Which obligations come first? It is often argued that the person required to pay has a second family. The law is clear that responsibility for a second family cannot relieve the parent of the responsibility to support the first family.

However, the court will not allow children of a second family to suffer more than the children of the first family. The court may allow a reduction based on an argument of "undue hardship." To make this argument, you must provide full financial disclosure both for yourself and for your new spouse

or partner. The court will then decide whether the new obligations should take priority over the child support obligations for the first family.

**"My former spouse (partner) delayed in coming to court to enforce payment of arrears."**

The fact that the parent with custody allowed the arrears to build up without taking steps to enforce payment is not an argument for cancelling or reducing arrears. There are two reasons for this. First, a child cannot give up the right to child support, nor can a parent with custody give up that right on behalf of a child. Second, very often all of the resources of the parent with custody -- financial, physical and emotional -- are used up in caring for the child. That parent is not in a position to take action for the payment of arrears.

However, a court may consider delay as a factor if you can show that you have been prejudiced by the delay -- in other words that there are some special circumstances that make it unfair to enforce payment of the arrears now.

**"My former spouse (partner) will get a windfall."**

This is sometimes called the rule against hoarding. The law is now clear that it does not apply to paying child support arrears. This is because the rule against hoarding rewards the person who disobeys the Court Order to pay. It assures the paying parent that if he or she can avoid making payments long enough, a court will reduce or cancel those payments. This is contrary to public policy.

The rule also does not apply because the courts feel that the obligation to pay arrears of child support should be enforced in fairness to the parent with custody. After all, the custodial parent has had to bear the bulk of the child rearing expenses without adequate assistance from the other parent.

**"The children have not suffered because others provided assistance."**

This argument suggests that no harm has really been done. This has also been rejected by the courts. Arguing that the court should reduce or eliminate arrears of child support because someone else has provided this financial support, does not recognize the financial obligation of the person who was ordered to pay child support. An Order in these circumstances



would ignore the fact that both parents have an obligation to support their children.

**"My child does not need the money now."**

This is like the last argument. It also has been rejected. Even if the child is being adequately supported now, or is an adult, the court recognizes that the child or the parent with custody has had a lower standard of living than they should have because the child support has not been paid. In this case it may be appropriate to compensate either the child, or the parent with custody.

**"My former spouse (partner) agreed that I did not have to pay."**

This argument is usually rejected by the court as well. Even if such an agreement exists, it is seldom enforced because the parent with custody does not have the right to make such an agreement. Child support is the right of the child, not the parent.

However, if there are special circumstances in which a verbal agreement was made (for example, if one or more of the children lived with you for a period of time) then the court may consider reducing arrears.

**"My former spouse (partner) prevented me from having access."**

It has been decided that lack of access between a parent and child will not be considered when determining whether arrears of child support should be reduced. The court can assist you to enforce the right to access in other ways.

**"I spent a lot of money on my children, even though I was not paying all that was required by the Court Order."**

This generally does not provide a legal excuse for not paying child support and does not provide a reason for reducing or cancelling arrears. Child support is required for many reasons and it is up to the parent who is entitled to receive it to decide how it should be spent in the best interests of the children.

However, there may be special circumstances in which an agreement was made between the parents where the paying

parent would pay certain expenses instead of child support, which may be considered by the court. In this case, the paying parent would have to provide proof of the expenses actually paid on behalf of the children and proof of the existence of the agreement.

**"I did not have legal advice when the Order was made or during the time when the payments were not made."**

The fact that a person did not have legal advice when the Order was made, or during the time when the arrears added up, is not a reason to reduce or cancel arrears.

## **Providing Evidence for Court**

When you apply for, or to change, a Child Support Order or to reduce or cancel arrears, it is necessary to provide full and detailed financial disclosure to the court, under oath (usually in the form of an affidavit).

The requirement that the information be under oath is an important one. A decision to make or to change a Court Order can only be made on accurate and complete information. This evidence must be sworn or affirmed to be true. If there is no such sworn evidence, it is as if the judge has no evidence on which to base the Child Support Order.

Evidence cannot be hearsay. That is, you cannot say in an affidavit things that you did not see or hear personally. If someone else told you an important fact, you must have that person provide an affidavit with that fact.

Wilfully providing false information under oath, whether in an affidavit or in a court proceeding, is a crime under the Criminal Code. You could be sentenced to a maximum of fourteen years in prison.

You do not get a second chance to provide evidence to the court. If all of your evidence is not provided at the time of your application, the court can either make a decision based upon the evidence that is provided, or can order you to provide the information and to pay costs as a penalty.





## **Appendix 1: Sections From the Federal Child Support Guidelines**

### **Presumptive rule**

3. (1) Unless otherwise provided under these Guidelines, the amount of a child support order for children under the age of majority is

(a) the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the spouse against whom the order is sought; and

(b) the amount, if any, determined under section 7.

### **Child the age of majority or over**

(2) Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is

(a) the amount determined by applying these Guidelines as if the child were under the age of majority; or

(b) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.

### **Special or extraordinary expenses**

7. (1) In a child support order the court may, on either spouse's request, provide for an amount to cover the following expenses, or any portion of those expenses, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense, having regard to the means of the spouses and those of the child and to the family's spending pattern prior to the separation:

(a) child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment;

(b) that portion of the medical and dental insurance premiums attributable to the child;

(c) health-related expenses that exceed insurance reimbursement by at least \$100 annually per illness or event, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;

(d) extraordinary expenses for primary or secondary school education or for any educational programs that meet the child's particular needs;

(e) expenses for post-secondary education; and

(f) extraordinary expenses for extracurricular activities.

## **Sharing of expense**

(2) The guiding principle in determining the amount of an expense referred to in subsection (1) is that the expense is shared by the spouses in proportion to their respective incomes after deducting from the expense, the contribution, if any, from the child.

## **Subsidies, tax deductions, etc.**

(3) In determining the amount of an expense referred to in subsection (1), the court must take into account any subsidies, benefits or income tax deductions or credits relating to the expense, and any eligibility to claim a subsidy, benefit or income tax deduction or credit relating to the expense.

## **Split-custody**

8. Where each spouse has custody of one or more children, the amount of a child support order is the difference between the amount that each spouse would otherwise pay if a child support order were sought against each of the spouses.

## **Shared-custody**

9. Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account

(a) the amounts set out in the applicable tables for each of the spouses;

(b) the increased costs of shared-custody arrangements; and

(c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

## **Undue hardship**

10. (1) On either spouse's application, a court may award an amount of child support that is different from the amount determined under any of sections 3 to 5, 8 or 9 if the court finds that the spouse making the request, or a child in respect of whom the request is made, would otherwise suffer undue hardship.

## **Circumstances that may cause undue hardship**

(2) Circumstances that may cause a spouse or child to suffer undue hardship include the following:

(a) the spouse has responsibility for an unusually high level of debts reasonably incurred to support the spouses and their children prior to the separation or to earn a living;

(b) the spouse has unusually high expenses in relation to exercising access to a child;

(c) the spouse has a legal duty under a judgment, order or written



separation agreement to support any person;

(d) the spouse has a legal duty to support a child, other than a child of the marriage, who is

(i) under the age of majority, or

(ii) the age of majority or over but is unable, by reason of illness, disability or other cause, to obtain the necessities of life; and

(e) the spouse has a legal duty to support any person who is unable to obtain the necessities of life due to an illness or disability.

### **Standards of living must be considered**

(3) Despite a determination of undue hardship under subsection (1), an application under that subsection must be denied by the court if it is of the opinion that the household of the spouse who claims undue hardship would, after determining the amount of child support under any of sections 3 to 5, 8 or 9, have a higher standard of living than the household of the other spouse.

### **Standards of living test**

(4) In comparing standards of living for the purpose of subsection (3), the court may use the comparison of household standards of living test set out in Schedule II.

### **Reasonable time**

(5) Where the court awards a different amount of child support under subsection (1), it may specify, in the child support order, a reasonable time for the satisfaction of any obligation arising from circumstances that cause undue hardship and the amount payable at the end of that time.

### **Reasons**

(6) Where the court makes a child support order in a different amount under this section, it must record its reasons for doing so.

### **Determination of annual income**

15. (1) Subject to subsection (2), a spouse's annual income is determined by the court in accordance with sections 16 to 20.

### **Agreement**

(2) Where both spouses agree in writing on the annual income of a spouse, the court may consider that amount to be the spouse's income for the purposes of these Guidelines if the court thinks that the amount is reasonable having regard to the income information provided under section 21.

### **Calculation of annual income**

16. Subject to sections 17 to 20, a spouse's annual income is determined using the sources of income set out under the heading

"Total income" in the T1 General form issued by Revenue Canada and is adjusted in accordance with Schedule III.

### **Pattern of income**

17. (1) Where the court is of the opinion that the determination of a spouse's annual income from a source of income under section 16 would not provide the fairest determination of the annual income from that source, the court may determine the annual income from that source

(a) where the amount in respect of the source of income has increased in each of the three most recent taxation years or has decreased in each of those three years, to be the amount from that source of income in the spouse's most recent taxation year;

(b) where the amount in respect of the source of income has not increased or decreased as described in paragraph (a), to be the average of the amount received by the spouse from that source of income in the three most recent taxation years, or such other amount, if any, that the court considers appropriate; or

(c) where the spouse has received a non-recurring amount in any of the three most recent taxation years, to be such portion of the amount as the court considers appropriate, if any.

### **Non-recurring losses**

(2) Where a spouse has incurred a non-recurring capital or business investment loss, the court may, if it is of the opinion that the determination of the spouse's annual income under section 16 would not provide the fairest determination of the annual income, choose not to apply sections 6 and 7 of Schedule III, and adjust the amount of the loss, including related expenses and carrying charges and interest expenses, to arrive at such amount as the court considers appropriate.

### **Shareholder, director or officer**

18. (1) Where a spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the spouse's annual income as determined under section 16 does not fairly reflect all the money available to the spouse for the payment of child support, the court may consider the situations described in section 17 and determine the spouse's annual income to include

(a) all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation year; or

(b) an amount commensurate with the services that the spouse provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income.

### **Adjustment to corporation's pre-tax income**

(2) In determining the pre-tax income of a corporation for the purposes of subsection (1), all amounts paid by the corporation as

salaries, wages or management fees, or other payments or benefits, to or on behalf of persons with whom the corporation does not deal at arm's length must be added to the pre-tax income, unless the spouse establishes that the payments were reasonable in the circumstances.

### **Imputing income**

19. (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

- (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
- (b) the spouse is exempt from paying federal or provincial income tax;
- (c) the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;
- (d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;
- (e) the spouse's property is not reasonably utilized to generate income;
- (f) the spouse has failed to provide income information when under a legal obligation to do so;
- (g) the spouse unreasonably deducts expenses from income;
- (h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income; and
- (i) the spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.

### **Reasonableness of expenses**

(2) For the purpose of paragraph (1)(g), the reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the Income Tax Act.

### **Non-resident**

20. Where a spouse is a non-resident of Canada, the spouse's annual income is determined as though the spouse were a resident of Canada.

### **Obligation of applicant**

21. (1) A spouse who is applying for a child support order and whose income information is necessary to determine the amount of the order must include the following with the application:

- (a) a copy of every personal income tax return filed by the spouse for



each of the three most recent taxation years;

(b) a copy of every notice of assessment or re-assessment issued to the spouse for each of the three most recent taxation years;

(c) where the spouse is an employee, the most recent statement of earnings indicating the total earnings paid in the year to date, including overtime or, where such a statement is not provided by the employer, a letter from the spouse's employer setting out that information including the spouse's rate of annual salary or remuneration;

(d) where the spouse is self-employed, for the three most recent taxation years

(i) the financial statements of the spouse's business or professional practice, other than a partnership, and

(ii) a statement showing a breakdown of all salaries, wages, management fees or other payments or benefits paid to, or on behalf of, persons or corporations with whom the spouse does not deal at arm's length;

(e) where the spouse is a partner in a partnership, confirmation of the spouse's income and draw from, and capital in, the partnership for its three most recent taxation years;

(f) where the spouse controls a corporation, for its three most recent taxation years

(i) the financial statements of the corporation and its subsidiaries, and

(ii) a statement showing a breakdown of all salaries, wages, management fees or other payments or benefits paid to, or on behalf of, persons or corporations with whom the corporation, and every related corporation, does not deal at arm's length; and

(g) where the spouse is a beneficiary under a trust, a copy of the trust settlement agreement and copies of the trust's three most recent financial statements.

### **Obligation of respondent**

(2) A spouse who is served with an application for a child support order and whose income information is necessary to determine the amount of the order, must, within 30 days after the application is served if the spouse resides in Canada or the United States or within 60 days if the spouse resides elsewhere, or such other time limit as the court specifies, provide the court, as well as the other spouse or the order assignee, as the case may be, with the documents referred to in subsection (1).

### **Special expenses or undue hardship**

(3) Where, in the course of proceedings in respect of an application for a child support order, a spouse requests an amount to cover expenses referred to in subsection 7(1) or pleads undue hardship, the spouse who would be receiving the amount of child support must, within 30

days after the amount is sought or undue hardship is pleaded if the spouse resides in Canada or the United States or within 60 days if the spouse resides elsewhere, or such other time limit as the court specifies, provide the court and the other spouse with the documents referred to in subsection (1).

### **Income over \$150,000**

(4) Where, in the course of proceedings in respect of an application for a child support order, it is established that the income of the spouse who would be paying the amount of child support is greater than \$150,000, the other spouse must, within 30 days after the income is established to be greater than \$150,000 if the other spouse resides in Canada or the United States or within 60 days if the other spouse resides elsewhere, or such other time limit as the court specifies, provide the court and the spouse with the documents referred to in subsection (1).

### **Making of rules not precluded**

(5) Nothing in this section precludes the making of rules by a competent authority, within the meaning of section 25 of the Act, respecting the disclosure of income information that is considered necessary for the purposes of the determination of an amount of a child support order.

### **Failure to comply**

22. (1) Where a spouse fails to comply with section 21, the other spouse may apply

(a) to have the application for a child support order set down for a hearing, or move for judgment; or

(b) for an order requiring the spouse who failed to comply to provide the court, as well as the other spouse or order assignee, as the case may be, with the required documents.

### **Costs of the proceedings**

(2) Where a court makes an order under paragraph (1)(a) or (b), the court may award costs in favour of the other spouse up to an amount that fully compensates the other spouse for all costs incurred in the proceedings.

### **Adverse inference**

23. Where the court proceeds to a hearing on the basis of an application under paragraph 22(1)(a), the court may draw an adverse inference against the spouse who failed to comply and impute income to that spouse in such amount as it considers appropriate.

### **Failure to comply with court order**

24. Where a spouse fails to comply with an order issued on the basis of an application under paragraph 22(1)(b), the court may

(a) strike out any of the spouse's pleadings;

- (b) make a contempt order against the spouse;
- (c) proceed to a hearing, in the course of which it may draw an adverse inference against the spouse and impute income to that spouse in such amount as it considers appropriate; and
- (d) award costs in favour of the other spouse up to an amount that fully compensates the other spouse for all costs incurred in the proceedings.

### **Continuing obligation to provide income information**

25. (1) Every spouse against whom a child support order has been made must, on the written request of the other spouse or the order assignee, not more than once a year after the making of the order and as long as the child is a child within the meaning of these Guidelines, provide that other spouse or the order assignee with

- (a) the documents referred to in subsection 21(1) for any of the three most recent taxation years for which the spouse has not previously provided the documents;
- (b) as applicable, any current information, in writing, about the status of any expenses included in the order pursuant to subsection 7(1); and
- (c) as applicable, any current information, in writing, about the circumstances relied on by the court in a determination of undue hardship.

### **Below minimum income**

(2) Where a court has determined that the spouse against whom a child support order is sought does not have to pay child support because his or her income level is below the minimum amount required for application of the tables, that spouse must, on the written request of the other spouse, not more than once a year after the determination and as long as the child is a child within the meaning of these Guidelines, provide the other spouse with the documents referred to in subsection 21(1) for any of the three most recent taxation years for which the spouse has not previously provided the documents.

### **Obligation of receiving spouse**

(3) Where the income information of the spouse in favour of whom a child support order is made is used to determine the amount of the order, the spouse must, not more than once a year after the making of the order and as long as the child is a child within the meaning of these Guidelines, on the written request of the other spouse, provide the other spouse with the documents and information referred to in subsection (1).

### **Information requests**

(4) Where a spouse or an order assignee requests information from the other spouse under any of subsections (1) to (3) and the income information of the requesting spouse is used to determine the amount



of the child support order, the requesting spouse or order assignee must include the documents and information referred to in subsection (1) with the request.

### **Time Limit**

(5) A spouse who receives a request made under any of subsections (1) to (3) must provide the required documents within 30 days after the request's receipt if the spouse resides in Canada or the United States and within 60 days after the request's receipt if the spouse resides elsewhere.

### **Deemed receipt**

(6) A request made under any of subsections (1) to (3) is deemed to have been received 10 days after it is sent.

### **Failure to comply**

(7) A court may, on application by either spouse or an order assignee, where the other spouse has failed to comply with any of subsections (1) to (3)

(a) consider the other spouse to be in contempt of court and award costs in favour of the applicant up to an amount that fully compensates the applicant for all costs incurred in the proceedings; or

(b) make an order requiring the other spouse to provide the required documents to the court, as well as to the spouse or order assignee, as the case may be.

### **Unenforceable provision**

(8) A provision in a judgment, order or agreement purporting to limit a spouse's obligation to provide documents under this section is unenforceable.



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Other areas call 310-0000

## **Internet Sources of Information**

Federal Justice Website: [www.canada.justice.gc.ca](http://www.canada.justice.gc.ca)  
Alberta Government Website: [www.gov.ab.ca](http://www.gov.ab.ca)  
Alberta Justice Website: [www.gov.ab.ca/just](http://www.gov.ab.ca/just)  
Alberta Courts Website: [www.albertacourts.ab.ca](http://www.albertacourts.ab.ca)  
Child Support Guidelines Website:  
[www.canada.justice.gc.ca/en/ps/sup/index.html](http://www.canada.justice.gc.ca/en/ps/sup/index.html)



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www.canada.justice.gc.ca	Federal Justice Website
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www.canada.justice.gc.ca/en/pas/sup/index.html	Child Support Guidelines Website